---

**U.S. Department of Labor**
Office of Administrative Law Judges
John W. McCormack Post Office & Courthouse
Room 507
Boston, Massachusetts

Date **mailed 11/27/96**
**Case No. 96-ERA-34**

**RONALD THOMPSON,**
Complainant

v.

**HOUSTON LIGHT & POWER COMPANY**,
Respondent

Case No. 96-ERA-38

**RONALD THOMPSON**,
Complainant

v.

**HOUSTON LIGHT & POWER COMPANY** and
**HOUSTON INDUSTRIES, INC.**
Respondents

***DECISION & ORDER***
***ON VARIOUS MOTIONS FOR SUMMARY DECISION***

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found in 29 C.F.R. Part 24, whereby employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (hereinafter "the NRC") and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The following

abbreviations shall be used herein: "CX"-Complainant Exhibits, and "RX"-Respondent Exhibits.

## I. Summary of the Motions

There are currently a number of Motions, along with Responses, Replies to Responses and Cross Motions, pending in the above titled consolidated cases. As far as concerns case no. 96-ERA-34, the Motions pending are: Respondent's Motion

---

[Page 2]

for Summary Decision in case no. 96-ERA-34, dated September 6, 1996; Complainant's Partial Response to Respondent's Motion for Summary Decision in case no. 96-ERA-34, dated September 23, 1996; and Respondent's Reply to Complainant's Partial Response, dated October 25, 1996.

The Motions currently pending in case no. 96-ERA-38 are: Respondents' Motion for Summary Decision in case no. 96-ERA-38, dated September 17, 1996; Complainant's Response to Respondents' Motion for Summary Decision in case no. 96-ERA-38 and Cross Motion for Partial Summary Decision, dated October 7, 1996; Respondents' Response to Complainant's Cross Motion for Partial Summary Decision, dated October 28, 1996; Complainant's Reply to Respondents' Responses to Complainant's Cross Motions for Partial Summary Decision, dated November 11, 1996; and, finally, Respondents' Response to Complainant's Reply to Respondents' Responses to Complainant's Cross Motions for Summary Decision, dated November 15, 1996.

The following discussion sets forth my ruling on each of the aforementioned Motions and the reasons therefor.

## II. Summary of the Evidence

The exhibits submitted in connection with the various Motions establish certain irrefutable facts:

1. On October 25, 1995, the Complainant, Ronald Thompson, and the Respondent, Houston Light & Power Company, executed a Settlement Agreement and Full and Final Release. The place of execution was Houston, Texas.

2. The terms of the agreement provided that reference to HL&P was a collective reference to Houston Light & Power Co. (hereinafter HL&P), Houston Industries, Inc. (hereinafter HII), and any other affiliates or subsidiaries of HL&P. **See Respondent's Motion for Summary Decision in Case No. 96-ERA-34, Exhibit B: Settlement Agreement and Full and Final Release, Part I (hereinafter RX-1).**

3. The Settlement Agreement disposed of "all claims and causes of action of any kind that currently exist, whether known or unknown, that relate in any way to [Complainant's] employment with HL&P." **RX-1, Part II, para. 4.**[1]

4. Respondents agreed to warrant that Complainant's access to the South Texas Project has not been

---



suspended, revoked, or denied. **RX-1, Part II, para. 5(b).**

5. Furthermore, Complainant agreed to release, acquit, and discharge HL&P from any and all claims or causes of action of every nature in any way arising out of or accruing during any time period of Complainant's employment with HL&P, prior to the date the parties affix their signatures to the document.[2] **RX-1, Part II, para. 6(b).**

6. On December 4, 1995, the U.S. Secretary of Labor entered a Final Decision and Order approving the Settlement Agreement and dismissing the complaints with prejudice. **See Respondent's Motion for Summary Decision in Case No. 96-ERA-34, Exhibit C: Final Order Approving Settlement and Dismissing Complaints 93-ERA-2 and 95-ERA-48 (hereinafter RX-2).** The Secretary restricted his review of the Settlement Agreement to whether the Agreement was a fair, adequate and reasonable settlement of Complainant's ERA claim(s). **RX-2.**

7. On January 4, 1996, William Beckner, Director, Project Directorate IV-1, wrote a letter to Mr. Cottle at HL&P making certain inquiries into the terms of the October 25, 1995, Settlement Agreement. **See Complainant's Partial Response to Respondent's Motion for Summary Decision in Case No. 96-ERA-34, Exhibit 1: Letter from William D. Beckner, Director, Project Directorate IV-1, to William Cottle, HL&P, of Jan. 4, 1996 (hereinafter CX-1)**. The substance of the letter will be more fully discussed below as it becomes relevant.

8. On or about April 2, 1996, Complainant filed a §211 whistleblower complaint against HL&P. The complaint was docketed case no. 96-ERA-34 and alleges that HL&P discriminated and harassed Complainant when HL&P notified the NRC and Respondent's Access Program Division that Complainant was a potential threat to the safety of the South Texas Project and when HL&P suspended Complainant's security access. **See Respondent's Motion for Summary Decision in Case No. 96-ERA-34, Exhibit D, Letter from David K. Colapinto to Administrator, Wage and Hour Division, of 4/2/96 (hereinafter RX-3).** The complaint alleges this latter action occurred on October 5, 1995. Finally, the complaint concludes with an allegation that Respondent's conduct is part of ongoing and continuing retaliation. **RX-3.**

9. On or about June 27, 1996, Complainant filed another §211 complaint. **See Respondent's Motion for Summary Decision in Case No. 96-ERA-38, Exhibit D:**

**Letter from David K. Colapinto to Rose J. Torrealba, OSHA/Whistleblower Investigator, DOL, of 6/27/96 (hereinafter RX-4).** This

---

[Page 4]

complaint, docketed as case no. 96-ERA-38, alleges that HL&P and HII have breached the aforementioned Settlement Agreement. Specifically, the Complaint alleges breach of Settlement Agreement paras. 5(a) and 5(b).[3] In addition, the Complaint alleges respondents have violated the ERA by denying Complainant access to certain medical records. **RX-4.**

On the basis of the totality of the record, I make the following:

## III. CONCLUSIONS OF LAW

The standard for granting summary decision is set forth at 29 C.F.R. §18.40(d) (1996). This section, which is derived from Fed. R. Civ. P. 56, permits an ALJ to recommend summary decision for either party where "there is no genuine issue as to any material fact." **29 C.F.R. §18.40(d).** Thus, in order for any of the various Motions, Cross Motions, or Partial Motions in this case to be granted, there must be no dispute as to material fact and the moving party must be entitled to prevail as a matter of law.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. **Gillilian v. Tennessee Valley Authority, 91-ERA-31 (Sec'y Aug. 28, 1995) (Citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).** The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the non-movant. **Id. (Citing OFCCP v. CSX Transp., Inc., 88-OFC-24 (Asst. Sec'y Oct. 13, 1994)).**

With this standard in mind, and acknowledging that summary decision is rarely granted, I now turn to an assessment of the parties' various arguments and supporting materials.

### A. Motions Pending in Claim 96-ERA-34

Respondent seeks summary decision, dismissing the entire complaint docketed 96-ERA-34, on the basis that it is barred by the October 25, 1995, Settlement Agreement and Full and Final Release. In support of this position, Respondent cites to cases in which the Fifth Circuit has awarded summary decision on

---

[Page 5]

the basis of a valid release. **See Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir.), cert. denied, 115 S.Ct. 582 (1994); Grillet v. Sears Roebuck & Co., 927 F.2d 217 (5th. Cir. 1991).**[4] **See Also Orr v. Brown & Root, Inc., 85-ERA-6 (summarily dismissing the claim because it concerned an alleged ERA violation covered by a valid settlement agreement).**

In this case, the Secretary has rendered a Final Decision & Order Approving the Settlement Agreement and Full and Final Release. **RX-2.** The Secretary found that the Agreement was a fair, adequate and reasonable settlement of Complainant's ERA complaints. **RX-2.** As such, Complainant may have challenged the Secretary's Final Order pursuant to 29 C.F.R. Part 24.7. This provision, which pertains to judicial review, provides that a party aggrieved by the Secretary's Final Order may file a petition in the appropriate District Court. **See 29 C.F.R. 24.7(a).** In the alternative, Complainant may commence a civil action against the person for whom such order was issued to require compliance with such order. **See 29 C.F.R. 24.8(b)(1).**

To hold otherwise would allow Complainant to challenge the validity of the Settlement Agreement, and thereby challenge the Secretary's Final Decision & Order approving that Agreement, before this Administrative Law Judge. Complainant's argument, as set forth in his Partial Response, makes it clear that this is exactly what he purports to do. For example, Complainant argues that the Settlement Agreement became subject to legal challenge when the NRC sent written notification[5] to the parties that certain material terms in the settlement agreement were void on the grounds of public policy and federal law.[6] **See Complainant's Partial Response to Respondent's Motion for Summary Decision in Case No. 96-ERA-34, p. 7.** In the alternative, Complainant argues that there was no settlement in regards to the terms that are illegal, against public policy and thus void. **Id. at 11.** In short, Complainant attempts to refute Respondent's Motion for Summary Decision by claiming that "at a minimum, there are genuine factual issues in dispute whether the Settlement Agreement is a valid contract which releases HL&P from liability over those matters raised in the complaint in DOL Case No. 96-ERA-34." **Id.**

First, I will note that I disagree with

---

[Page 6]

Complainant's assertion that there are factual issues in dispute as to the Settlement Agreement. Were it necessary, this Judge would be deciding a matter of law if I were to undertake an assessment of the legality of the contract. This is moot, however, given that my second point is this: try as I may, I have been unable to locate, in the Act or the Department's implementing regulations, a provision which would support Complainant's argument that he should now be allowed to challenge, in this forum, the violations alleged in 96-ERA-34.

Complainant relies on certain language in the case of **Orr v. Brown & Root, Inc., 85-ERA-6 (Sec'y Oct. 2, 1985),** to support his contention that the DOL retains inherent

jurisdiction over settlement agreements approved by the Secretary. The authority relied on by Complainant, however, is dicta.[7] As the Supreme Court has stated, "It is to the holdings of our cases, rather than their dicta, that we must attend..." **Kokkonen v. Guardian Life Ins. Co., 511 U.S. --, 128 L.Ed. 391, 396 (1994) (unanimous decision).**

Enforcement of a settlement agreement is more than just a continuation or renewal of the dismissed suit, and hence requires it own basis for jurisdiction. **Id. at 396.** In **Kokkonen**, the Supreme Court dismissed the breach of settlement agreement claim because there was no independent basis for federal jurisdiction. The Court summarized its position as follows

> The short of the matter is this: The suit involves a claim for breach of contract, part of the consideration for which was dismissal of an earlier federal suit. No federal statute makes that connection (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute...If the parties wish to provide for the court's enforcement of a dismissal- producing settlement agreement, they can seek to do so. **Kokkonen, 128 L.Ed. at 397-398.**

The **Kokkonen** holding has been acknowledged by the Secretary in **Williams v. Public Service Elec. & Gas Co., 94-ERA-2, n.2 (Sec'y April 10, 1995)**. In **Williams**, the Secretary found that the retention of jurisdiction clause authorizes the Department of Labor to hold further administrative proceedings prior to any party seeking an enforcement in District Court. **Id.** I interpret this as an indication of the Secretary's intent to conform his orders to the law as set out by a unanimous Supreme Court of the United States. **See Ing v. Jerry L. Pettis Veterans Affairs Medical Center, 96-ERA-32 (ALJ Sept. 4, 1996), dismissed with prejudice (ARB Sept. 27, 1996).**[8]

---



Accordingly, with regards to the Motion pending in case no. 96-ERA-34, I recommend a Decision & Order GRANTING Respondent's Motion for Summary Decision in Case No. 96-ERA-34.

**B. Motions Pending in Claim 96-ERA-38**

It is necessary, prior to embarking upon a substantive evaluation of the Motions pending in 96-ERA-38, for this ALJ to make clear that I interpret Complainant's complaint to allege separate and independent violations of the ERA rooted in breach of the settlement agreement. That is to say that the remaining complaint consists of allegations and seeks redress not for mere breach of settlement agreement but for violation of the ERA by virtue of the breached agreement. Although Complainant's assertions in the collection of Motions, Cross Motions and Partial Responses presently before me are at times not clear on this, I must view the material in favor of the non-movant. And so I proceed with this construction in mind.[9]

Respondent moves for summary judgment in case no. 96-ERA-38 on the basis that HII is not an "employer" subject to jurisdiction under the Act. As is appropriate in every case which turns on statutory construction, I begin with the language of the statute. **See Adams v. Dole, 927 F.2d 771, 774 (4th Cir. 1991) (Citing United States v. Jackson, 759 F.2d 342, 344 (4th Cir. 1985).** If the intent of Congress is clear, that is the end of the matter, and this ALJ must give effect to the unambiguously expressed intent of Congress. **Id.**

As Respondent correctly points out, Section 211 of the ERA defines employer to include (A) a licensee of the Commission or of an agreement State, (B) an applicant for a license from the Commission or such an agreement State, (C) a contractor or subcontractor of such a licensee or applicant, and (D) a contractor or subcontractor of the Department of Energy. **42 U.S.C. §5851(a)(2), As Amended By 1992 Pub.L. 102-486, §2902(a).** Consistent with the holding in **Adams, supra**, I find that the word "includes", as it appears in the current version of the statute, is meant to be definitional rather than illustrative. **Adams, 927 F.2d at 777.** Therefore, if the Respondent HII cannot be held to come within this definition of an employer, this Court must dismiss HII from the complaint. **See Saporito v. Florida Power & Light Co. et al., 94-ERA-35 (ARB July 19, 1996); Williams v. Y-12 Nuclear Weapons Plant, 95-CAA-10 (ALJ August 2, 1995). See Also Billings v. OWCP, 91-ERA-35 (Sec'y Sept. 24, 1991) (applying the same analysis to the pre-1992 statute).**

---



The summary decision materials presently before me compel me to deny Respondents' Motion on the basis that it cannot be said, as a matter of law, that HII does not come within this definition of an employer. Respondent has submitted an affidavit, sworn to by Mr. Bill Cottle, Executive Vice President and General Manager, Nuclear, attesting to the fact that HII is neither a nuclear power plant operator nor an applicant for any NRC Commission license. **See Exhibit A Attached to Respondents' Motion for Summary Decision in Case No. 96-ERA-38.** Of course, this still leaves open the question of whether HII is a contractor or subcontractor of such a licensee or applicant or contractor/subcontractor of the DOE. None of the summary decision materials presently before this ALJ sustain the Respondents' burden of proof on this fact and, accordingly, I cannot grant their Motion.

In the alternative, Respondents move for summary decision on the basis that this ALJ has no jurisdiction over the issues raised in the Complaint dated June 27, 1996. Respondents argue that the DOL has no jurisdiction because the Complainant, at the time of the ERA violations alleged in his June 27, 1996, Complaint, was no longer an employee of HL&P. Accordingly, Respondents would have this ALJ reason that none of the acts of discrimination arise out of his employment relationship with HL&P.

I find, as the U.S. Court of Appeals stated in **Connecticut Light & Power v. Secretary of Labor, 85 F.3d 89 (2d Cir. 1996),** that this argument is specious. **85 F.3d**

**at 95 (stating that any argument that the challenged activity does not discriminate with respect to terms of employment, rather arise from post-termination lawsuit, is "specious").** The Settlement Agreement is an attempt to resolve, among other issues, the final terms of Complainant's employment. To find otherwise would be to ignore the simple facts. Accordingly, Respondent's Motion for Summary Decision on the basis that Complainant was no longer an employee is DENIED.

Similarly, I must DENY Complainant's Cross Motion for Partial Summary Decision. It cannot be held, as a matter of law, that HII is a joint employer and thereby subject to the Act. The summary decision material submitted in connection with this argument, a document that purports to be HII's 1996 proxy statement, is incapable of sustaining Complainant's burden for such

---

[Page 9]

a Motion. Complainant wisely requests he be afforded his right to conduct discovery on this issue. As the record now stands, there are insufficient fact and circumstances to show that the companies are highly integrated with respect to ownership and operation. **See Williams, supra, (ALJ August 8, 1995).**

Furthermore, I cannot hold as a matter of law that HII has submitted to DOL jurisdiction by its participation in the Settlement Agreement. The Department's jurisdiction is clearly defined by statute and regulation. In the context of an ERA case, the Department has jurisdiction over employers and persons subject the Act. Although Complainant's argument that an entity is subject to the Department's jurisdiction once it voluntarily appears in that forum may have some merit, it is not dispositive in this case. This is because the Settlement Agreement, by its terms, implicates areas of the law over which this ALJ, or the DOL for that matter, has no jurisdiction. **See supra, Part II, para. 3 and n. 1.** I have been presented with no evidence that establishes HII specifically conceded to being an employer subject to the Act and, thus, within the DOL's limited jurisdictional grasp.

**C. Complainant's Motion for Partial Summary Decision in Claims 96-ERA-34 and 96-ERA-38**

Complainant's Motion for Partial Summary Decision on the issue of whether he is entitled, as a matter of law, to pursue his allegations of breach of settlement agreement through the U.S. Department of Labor is DENIED. If this Court were to issue such an overbroad holding, the decision would be contrary to the U.S. Supreme Court's holding in **Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).** The discussion at Part III(A) of this Decision is equally applicable here.

The Complainant's allegations of breach of settlement agreement are distinguishable from a complaint for violation of the ERA rooted in a violation of a settlement.

Accordingly, Complainant's reliance on **Blanch v. Northeast Nuclear Energy Co., 90-ERA-11 (Sec'y May 11, 1994),** is misplaced.

Complainant's Motion for Partial Summary Decision on the issue of Respondents' liability for alleged breach of the Settlement Agreement is DENIED. The question of liability is a question of fact. It requires a determination as to whether alleged acts of the Respondents are sufficient to constitute discriminatory action in violation of the ERA. This, of course, would require an assessment of the credibility of those persons reciting the facts as they believe them to be. As such, the issue of liability may not be summarily decided.

---

[Page 10]

**IV. Conclusion**

Based on the foregoing, my Order is as follows:

1. Respondent's Motion for Summary Decision in Case No. 96-ERA- 34 is GRANTED. See Decision & Order, Part III(A).
2. Respondent's Motion for Summary Decision in Case No. 96-ERA- 38 is DENIED. Specifically, Respondent's Motion for Summary Judgment is denied because I construe Complainant's complaint as alleging separate and independent violations of the ERA rooted in a violation of the Settlement Agreement. See Decision & Order, Part III(B).
3. Complainant's Motion for Partial Summary Decision in Claims No. 96-ERA-34/38 is DENIED. See Decision & Order, Part III(C).

David W. DiNardi,
Administrative Law Judge

DATED: November 27, 1996
Boston, Massachusetts
DWD/jw/las

**[ENDNOTES]**

[1]Para. 4 is further clarified by para. 5(c) which states that the release includes claims and causes of action under a number of Federal and State statutes.

[2]The agreement was signed and dated October 25, 1995.

[3]Respectively, these paragraphs provided that respondents would continue to pay medical benefits and would warrant that Complainant's security access has not been suspended, revoked or denied during his employment.

[4]While the legal principle of these cases is applicable to the issue presently under consideration, it may be noted that the underlying facts are distinguishable. In both Williams and **Grillet**, the Court awarded summary judgment because there existed a voidable release that had been ratified. In the instant case, there exists, by virtue of the Secretary's review of the matter, a valid Settlement Agreement and Full and Final Release.

[5]Notably, this written notification was dated January 4, 1996. **CX-1.** Complainant, had he acted on what he now argues creates a basis for challenging the Settlement Agreement, would have been within the 60 day time limitation established by 29 C.F.R. 24.7(a).

[6]Complainant's brief states that the NRC reached a "determination" that HL&P could not simultaneously satisfy the terms of the Settlement Agreement and NRC regulations.

Complainant claims the NRC "found" that other material terms of the Agreement violated public policy. **See Complainant's Partial Response to Respondent's Motion for Summary Decision in Case No. 96-ERA-34, p. 6.** The letter, in fact, states that certain sentences in the Agreement "*may* give rise to a conflict with NRC requirements." The letter goes on to say that if HL&P or Complainant were to fail to reveal the suspension of Complainant's unescorted access, the failure would be a violation of NRC regulations and the violator *may be* subject to enforcement action by the NRC.

[7]In **Orr**, the Complainant brought a complaint for breach of settlement agreement and new, independent violations of the ERA. The breach of settlement agreement charge was withdrawn. The new, independent violations were covered by the agreement and, therefore, the complaint was dismissed.

[8]On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute and these regulations to the Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996).

[9]If, per chance, I have misconstrued the claim and Complainant's claim is actually a claim for breach of Settlement Agreement, then Part III(A) of this decision is fully applicable.